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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1961

JAMES MURPHY AND ROBI MERCER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–19) is reported at 290 F. 2d 573.

JURISDICTION

The judgment of the court of appeals was filed on May 19, 1961. Petition for rehearing was denied on May 25, 1961. The petition for a writ of certiorari was filed on August 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a truck and sugar being loaded thereon and other related materials were properly seized as

property intended for use in violation of the internal revenue laws.

STATUTES INVOLVED

26 U.S.C. 7608 provides in pertinent part:

> Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may—
>
> * * * * * *
>
> (3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and
>
> (4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States.

26 U.S.C. 5686(a) provides:

> It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

26 U.S.C. 7302 provides:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

STATEMENT

In the Western District of Pennsylvania petitioners and another were charged in a complaint filed with the United States Commissioner with unlawful possession of "property intended for use in violating" federal liquor laws (26 U.S.C. 5686(a)). Petitioners waived a hearing before the Commissioner on August 31, 1960. Before indictment, petitioners moved for the return of certain property seized and its suppression as evidence against them on the ground that the

arrest and seizure were executed without a warrant. The motion was denied by the district court. The court of appeals affirmed the judgment of the district court on May 19, 1961.[1]

The evidence at the hearing on the motion to suppress showed that the federal alcohol agents were aware that a carload of sugar was arriving at a private siding owned by petitioner Murphy at Forrestville, Pennsylvania (R. 2b, 4b). At about 2:00 p.m. on Thursday, August 25, 1960, a freight car loaded with four hundred 100-pound bags of sugar did arrive at the siding. Agents kept the freight car under surveillance. The sugar was billed to the "Murphy Products Company, Harrisville, Pennsylvania (Sub Zilka Flour Company)" and was purchased by Murphy through a broker. The designation "Sub Zilka Flour Co." indicated that the Zilka Flour Company of Monessen, Pennsylvania, a firm required by the Treasury Department regularly to report its sugar inventory and sales because of suspected diversion of

[1] A question of the appealability of such a motion made prior to indictment was raised by the court below. It is the government's position that in the circumstances of this case where before indictment there is a request for the return of property (here sugar, certain equipment, vehicles and currency) which in itself is not contraband, the order is appealable. *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944. In the government's view a different situation is presented where the sole purpose of the motion is to suppress the use of evidence in the criminal proceeding. This is the position it is taking in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2), pending on writ of certiorari, No. 21, this Term; cf. *Saba* v. *United States*, 282 F. 2d 255 (C.A. 5), pending on petition for a writ of certiorari, No. 34, this Term.

sugar for illegal purposes, was to be notified upon arrival of the freight (R. 4b, 5b)..

Two days later, August 27, 1960, about 11:20 a.m., petitioner Mercer, owner of the Mercer Milling Company, of Wilson, North Carolina, also a firm required to report its sugar inventory and sales to the Treasury Department, arrived at the siding driving a tractor-trailer, registered in the name of the Mercer Milling Company (R. 2b–3b). The Mercer Milling Company was known not to be a functioning business (R. 5b).

At about 12:30 that same day, co-defendant Zilka arrived at the railroad siding. Soon thereafter, two men, later identified as regular employees of the Murphy Products Company, arrived and began to unload the sugar from the freight car and load it into petitioner Mercer's tractor trailer (R. 2b–3b). Zilka assisted in the transfer while Mercer remained in the cab of the tractor trailer. The whole transaction was observed by Treasury agents. Zilka and Mercer were recognized by the agents as suspected sugar diverters (R. 2b–3b). In fact Agent Scalera testified that he had apprehended petitioner Mercer unloading 348 bags of sugar into a rural smokehouse at 3:00 a.m. some two months prior to the instant arrest and had found a receipt for the sugar from co-defendant Zilka's company on Mercer's person (R. 4b–5b). Agent Jennis also testified that he had knowledge of the bill of lading involved in the instant transaction (Pet. 7).

After the loading of sugar onto the trailer truck commenced, the Treasury agents arrested Mercer and

Zilka. The agents seized the four hundred bags of sugar, a two-wheeled hand truck, one dock ramp, the tractor-trailer, and $3,546.00 in currency from Mercer. Petitioner Murphy was arrested on August 29, 1960, at the office of the United States Commissioner.

ARGUMENT

The evidence summarized in the Statement shows that, as both courts below found, the agents had probable cause to believe that the sugar being loaded onto the tractor-trailer, the trailer itself, and the other property seized constituted property intended to be used in violation of the internal revenue laws. They therefore had reasonable cause to believe that the property was subject to forfeiture under 26 U.S.C. 7302 and that petitioner Mercer was then and there committing an offense under 26 U.S.C. 5686(a). At the time of the seizure the agents saw two persons, Mercer and Zilka, suspected of diverting sugar for illegal purposes. Mercer had previously been arrested for a similar offense involving sugar sold to him by Zilka. The transfer of the sugar was taking place in an isolated area far from the place of business of the individuals involved. Mercer, the proprietor of a non-functioning business, had come from North Carolina for a commodity readily obtainable in his own area. The Zilka Flour Company's place of business was also a considerable distance from the siding. All of these facts and circumstances were sufficient to constitute probable cause to believe that an offense was being committed. See *De Hart* v. *United States*, 237 F. 2d 227 (C.A. 4), where a con-

viction on substantially similar evidence was upheld.

Petitioners argue that the arrest of Mercer and Zilka was nevertheless illegal because the offense under 26 U.S.C. 5686(a) is a misdemeanor and under 26 U.S.C. 7608 internal revenue agents have authority to arrest for a misdemeanor only when it is being committed in their presence. They argue that the offense was not being committed in the presence of the officers since the agents had to rely on past knowledge for the element of intent. A similar contention is before the Court in *Chapman* v. *United States*, No. 287 Misc. this Term, the Court of Appeals for the Fifth Circuit having ruled, on similar facts, in accord with the ruling below, that the events witnessed by the agents, plus the knowledge they already had, justified them in concluding that an offense was being committed in their presence. *Chapman* v. *United States*, 289 F. 2d 539. As in *Chapman*, there is no question that the agents here saw the possession. While intent cannot of course be seen, the total circumstances observed by the agents, discussed above, made it apparent to them that the intent did then exist. Therefore, the total offense—including possession and intent—was being committed in the presence of the agents.

In any event, the seizure may be justified without regard to the validity of the arrest. As noted at the outset, there was clearly probable cause to believe that the tractor trailer, a movable vehicle, and the sugar being transferred thereto, were subject to forfeiture under 26 U.S.C. 7302 as property intended to be used

in violation of the internal revenue laws. The decisions of this Court in *Brinegar* v. *United States*, 338 U.S. 160, and *Carroll* v. *United States*, 267 U.S. 132, establish that a movable vehicle may be searched without a warrant on probable cause to believe that it is being used in violation of the laws of the United States and that property being so used may be seized.[2] The right at issue is the right to search and to seize, independent of the right to arrest. Because of the mobile nature of the vehicle, the search and seizure, even though without a warrant, are regarded as reasonable under the Fourth Amendment if made on probable cause to believe that the vehicle is being used in violation of law. That reasoning applies here. The agents saw the sugar being loaded in Pennsylvania on a truck belonging to Mercer who lived in North Carolina. Before they could get a warrant, the truck could have been on its way and the sugar disposed of. While the agents knew beforehand that the sugar was coming, they did not know until they saw him that Mercer from North Carolina was picking it up. They therefore had the right to seize the truck and its contents on probable cause to believe that it was being used to violate the law. See *Grogan* v. *United States*, 261 F. 2d 86 (C.A. 5), certiorari denied, 359 U.S. 944, where the seizure of a truck and sugar and the subsequent forfeiture thereof were upheld on the basis of

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[2] *Henry* v. *United States*, 361 U.S. 98, does not change this principle. The Court merely found on the facts of that case that the agents did not have information amounting to probable cause before they stopped the vehicle.

the right to search movable vehicles, the court finding it unnecessary to decide whether there was a right to arrest for a misdemeanor.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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